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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 172

WALTER W. JOHNSON COMPANY,
Petitioner,

vs.

RECONSTRUCTION FINANCE CORPORATION,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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SUBJECT INDEX

	Page
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statement of the Case	3
Reasons Relied on for the Allowance of the Writ	9
Argument	10
I. The District Court made no attempt to determine whether there were genuine issues as to any material facts, and wholly ignored issues which were plainly triable.	10
II. The Court of Appeals made the same error, and, instead of ascertaining what the issues were, or considering the conflicting evidence bearing thereon, merely stated that it agreed with the lower court.	21
III. The net result of the two decisions is that the petitioner has been deprived of his fundamental right to a trial on the merits.	23
IV. The failure of both courts to give serious or any consideration to the requirements of Federal Rule 56(c) amounts to so gross a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision (Sup. Ct. Rule 38, 4, (b)).	24
Conclusion	24

TABLE OF AUTHORITIES CITED

Pages

Adams v. California Mutual B. & L. Association, 18 C. (2d), 487 (1941) 13

Begnaud v. White, 170 F. (2d) 323 (CCA 6-1948) 13, 14, 23
Benner v. I. A. C., 26 C. (2d) 346 (1945) 13
Berkey v. Halm, 101 C.A. (2d) 62 (1950) 13
Bollinger v. National Fire Insurance Co., 25 C. (2d) 399 (1944) 13
Bowers v. E. J. Rose Mfg Co., 149 F.(2d) 612, (CCA 9, 1945) 22

Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 1748 N.E. 498 (1931) 15
Cf. Knox v. Kaelber, 140 N. J. Eq. 474, 55 A.(2d) 53 (1947) 16
City of Richmond v. Goodloe, 308 Ky. 549, 215 S.W. (2d) 128 (1948) 15
Colby v. Klune, 178 F. (2d) 872 (CCA 2, 1949) 10
Crosby v. Clark, 132 Cal. 1, (1901) 19

Doehler Metal Furniture Co. v. U.S., 149 F. (2d) 130 (CCA 2, 1945) 10

Hadley v. Passaic, Nat. B & T Co., 113 NJ Eq. 548, 168 Atl. 38 (1933) 19

Industrial Indemnity Co. v. I. A. C., 115 C.A. (2d) 684 13

Johnson v. Clark, 7 Cal. (2d) 529 (1936) 19

Mitchell v. West End Park Co., 171 Ga. 878, 156 S.E. 888 (1931) 16

National Surety Co. v. County Bd. of Educ., 15 F(2d) 993 (CCA 4, 1926) 18
Niemann v. Nadelman, 136 Misc. 386, 240 N.Y.S. 47 (1930) 15
Northwestern Mut. Sav. & L. Ass'n v. Kessler, 66 N.D. 737, 268 N.W. 692 (1936) 17

Oldland v. Gray, 179 F. (2d) 408 (CA 10, 1950) 20

Pages

Pacific Ready-Cut Homes Inv. v. Title Ins. & Trust Co. 216 Cal. 447 (1932) 18

Sampson v. Bruder, 47 Cal. App. (2d) 431, 435 (1941) 20
Sartor v. Arkansas Gas Corp., 321 U.S. 620, 88 L. Ed. 967 (1944) 10
Smith v. Anglo-Calif. Trust Co. 205 Cal. 496 (1928) 18

Theatre Realty Co. v. Aronberg-Fried Co., Inc., 85 F. (2d) 383 (8th Cir. 1936) 18
Title Guar. T. & S. Bank v. Clifton Forge Nat. Bank, 149 Va. 168, 140 S.E. 272 (1927) 17
Tuolumne Gold Dredging Corporation v. Walter W. Johnson Company, 61 F. Supp. 62 (D.C. Cal. 1944) 5
Tuolumne Gold Dredging Corporation v. Walter W. Johnson Company, 71 F. Supp. 111 (D.C. Cal. 1947) 5

Western Pipe & Steel Co. v. Tuolumne Gold Dredging Corporation, 63 C.A. (2d) 21 (1944) 5
Whitaker v. Coleman, 115 F. (2d) 305 (CCA 5, 1940) 10
Whiting-Mead Co. v. West Coast B & M Co., 66 C.A. (2d) 460 (1944) 18
Wichita Fed. Sav. & L. Ass'n v. Jones, 155 Kan. 821, 130 P. (2d) 556 (1942) 16, 18
Woodhead Lumber Co. v. E. G. Niemann Investments, Inc., 99 Cal. App. 456 (1929) 15

STATUTES

Pages

Reconstruction Finance Corporation Act (USCA Title 15, par. 601-607) 3

United States Code, Title 28:
Section 1254 (1) 2
Section 2101 (c) 2

RULES

Federal Rule 54 (b) 4

Federal Rule 56 (c) 10, 24

Sup. Ct. Rule 38, 4, (b) 10, 24

TEXTS

40 California Law Review 204, "Summary Judgment Under Federal Practice" by Judge Yankwich 10

9 California State Bar Journal, at page 246 23

Corbin on Contracts, Vol. 4, Sec. 776 15

Pomeroy Equity Jurisprudence, Vol. VI, Section 1080 (5th ed. 1941) 17

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WALTER W. JOHNSON COMPANY,
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RECONSTRUCTION FINANCE CORPORATION,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Walter W. Johnson Company, a corporation, files this petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review a judgment affirming a summary judgment of the United States District Court for the Northern District of California, Northern Division, upon petitioner's counterclaims to recover the balance of money due upon its construction of a gold dredge financed by respondent.

OPINIONS BELOW

The Opinion of the United States District Court for the Northern District of California, Northern Division, is reported in 137 F. Supp. 855. The first opinion of the United States Court of Appeals for the Ninth Circuit which dismissed the first appeal herein is reported at 223 Fed. (2d) 101. The second opinion of the United States Court of Appeals for the Ninth Circuit which affirmed the summary judgment of the District Court is reported in 230 Fed. (2d) 479.

JURISDICTION

The judgment of the Court of Appeals for the Ninth Circuit was entered on February 10, 1956. A petition for rehearing, filed in time, was denied on March 22, 1956.

Jurisdiction of this court is invoked under *United States Code,* Title 28, Section 1254(1), the writ having been applied for within ninety days as provided by United States Code Title 28, Section 2101(c).

QUESTIONS PRESENTED

(1) Whether the Court of Appeals erred when it affirmed the summary judgment granted by the District Court dismissing petitioner's five causes of counterclaim without considering the clear existence of many genuine issues of material facts in the case;

(2) Whether the Court of Appeals erred when it failed to specifically determine whether genuine issues of material facts existed as claimed by petitioner:

(a) That the respondent herein waived the statute of limitations and is estopped to assert laches;

(b) That petitioner had a lien upon the dredge;

(c) That respondent was unjustly enriched by appropriating proceeds from the operations of the dredge while petitioner remained unpaid;

(d) That respondent, by appropriating the proceeds of the operations of the dredge, did so as a constructive trustee for petitioner; and

(e) That respondent was liable for payment of state sales taxes incurred during construction of the dredge which were paid by petitioner.

STATEMENT OF THE CASE

Reconstruction Finance Corporation, plaintiff below and respondent here, hereinafter referred to as RFC, filed its Complaint to Foreclose Indenture and Chattel Mortgage (R. 3) on June 28, 1949. It invoked federal jurisdiction on grounds of the amount in controversy and as arising under the Reconstruction Finance Corporation Act (USCA Title 15, par. 601-607). Defendant below and petitioner here, Walter W. Johnson Company, a Nevada corporation, hereinafter referred to as Johnson, filed its answer which included five causes of counter-claim on June 30, 1950 (R. 74). Jurisdiction on the counterclaim was invoked on the ground of the amount in controversy and on the ground that Johnson was a Nevada corporation, whereas RFC was a federal corporation (R. 77). RFC filed its amended answer to Johnson's counter-claim on March 31, 1952, admitting the jurisdictional allegations (R. 91).

On June 5, 1953, pursuant to motion made by RFC and without oral argument, the District Court entered its order granting summary judgment to RFC dismissing the counterclaims (R. 243-274).

Johnson thereupon appealed to the Court of Appeals for the Ninth Circuit. That court dismissed the appeal because the District Court's order granting summary judgment was deemed not appealable because it did not dispose of the entire case and the judgment lacked the certification required by

Federal Rule 54(b). Johnson thereafter secured the necessary certification from the District Court and a subsequent appeal was taken to the Court of Appeals which, on February 10, 1956, entered judgment affirming the summary judgment upon the grounds specified in the memorandum opinion of the District Court (R. 481-4, 485). A petition for rehearing in the Court of Appeals was denied on March 22, 1956 (R. 486).

The record discloses the following factual situation:

In the latter part of 1936 RFC passed a resolution declaring its intention to make a loan to Tuolumne Gold Dredging Corporation (hereafter called Tuolumne) for the purpose of constructing a gold dredge (R. 78). Thereafter, Tuolumne entered into negotiations with Johnson for a contract for construction of the dredge. On many occasions the negotiations took place in the Washington offices of RFC with RFC actively participating in the drafting of the contract (R. 291, 292). On May 11, 1937 Tuolumne executed an Indenture and Chattel Mortgage for the benefit of RFC securing the payment of the principal sum of $600,000 to be loaned by RFC and used for construction of the dredge and related purposes (R. 78) (see Exhibit A to Complaint—R. 17-69).

On the same day, simultaneously with the execution of said mortgage and with the approval of RFC, Tuolumne entered into a contract with Johnson for the construction of the dredge (see Exhibit D to Agreed Statement of Facts —R. 192) specifying that the entire cost of the dredge would not exceed $552,500.

Johnson asserts completion of the dredge on June 13, 1938, and delivery to Tuolumne on September 20, 1938 (R. 79-80). At all times until June 15, 1938, there were ample monies in the Construction Fund established under the RFC

loan to pay Johnson the balance due for the construction of the dredge (R. 80) which in June 1938 amounted to $51,203.99 and the further sum of $7,815.41 for necessary parts and supplies furnished for the dredge (R. 81).

Notwithstanding the fact that adequate monies remained in the Construction Fund at that time to make payment of these obligations, Tuolumne and RFC depleted the Fund so that on September 24, 1938 there remained only $40,000 therein, which sum Tuolumne and RFC attempted unsuccessfully to compel Johnson to accept in full payment of its claims (R. 81).

Johnson thereafter brought an action against Tuolumne in the state courts for the monies due it, which resulted in protracted litigation between Johnson and Tuolumne, both in the state and federal courts, as a result, it was not until April 1949, that this litigation terminated and it was finally determined that Tuolumne was indebted to Johnson for the items in question (R. 81-83).

This litigation is reported as follows:

Western Pipe & Steel Co. v. Tuolumne Gold Dredging Corporation, 63 C.A. (2d) 21 (1944);

Tuolumne Gold Dredging Corporation v. Walter W. Johnson Company, 61 F. Supp. 62 (D.C. Cal. 1944);

Tuolumne Gold Dredging Corporation v. Walter W. Johnson Company, 71 F. Supp. 111 (D.C. Cal. 1947).

During the course of the litigation between Johnson and Tuolumne, representatives of RFC had, on numerous occasions, represented to Johnson that if Johnson prevailed against Tuolumne, RFC would arrange that the balance due Johnson under the contract would be paid (R. 215-216, 123,

219, 417-419). However, when Johnson approached RFC for payment after successfully prevailing in the litigation against Tuolumne, the RFC suddenly took the position for the first time that the question of liability was a "close one" and that, therefore, RFC could not make payment (R. 239).

The liability of RFC in this case is founded not only upon the Trust Indenture and Chattel Mortgage, but upon the underlying factual situation which was involved in the tripartite transaction between RFC, Tuolumne and Johnson, to arrange for the financing and construction of the gold dredge. The Affidavit of Mr. Walter Johnson shows one facet of this three-cornered relationship where he states that it was the usual practice of his company to retain legal title to a dredge until the work was completed and the purchase price was paid (R. 213). When the RFC began to finance the construction of gold dredges, however, it insisted upon a first mortgage on the dredge, and Johnson Company agreed to relinquish the title it normally reserved, solely upon the understanding that the RFC financing and the "Construction Fund" which such financing established, would unquestionably see that Johnson was paid (R. 213). In three prior instances of building dredges under RFC financing, Johnson had received full payment from the Construction Fund established under the Trust Indenture (R. 214).

The RFC was well aware of Johnson's attitude and reliance on the proceeds of the RFC loan long before the documents were signed in the instant transaction (R. 241, 397, 398). The gist of the transaction was that since Tuolumne was without funds or other assets, save for the value of exploratory work it had done, RFC would provide $600,000 under its Indenture (R. 371, 396). The cost of the dredge, $552,500, would thus be paid entirely out of the Construction

Fund (R. 371, 396). In fact, prior to execution of these agreements the RFC prepared a list of the expenditures to be made from the Construction Fund thus earmarking the loan funds (R. 397-398). Tuolumne planned to raise only $50,000 apart from the RFC loan (R. 396). Johnson was expected to contribute $10,000 of this $50,000 (R. 371). Tuolumne's $50,000 was to be added to the Construction Fund, and thus a total of $650,000 would be placed in the Construction Fund subject to RFC control (R. 38-39).

Johnson looked to and relied upon the RFC loan for payment of the dredge (R. 212, 396-8). Johnson's affidavit states:

> "* * * Upon many occasions during the course of preparation of both documents, it was stated by me and agreed to by others present representing RFC that I was looking for payment to Johnson Company of any money which might become due under the contract solely to the proceeds of the loan to be made by RFC and that I would not enter into such a contract for my company unless the loan was made. It was understood by all present and so stated, including to and by representatives of RFC, that Tuolumne did not have sufficient funds to pay for the construction of a dredge unless a loan was made by RFC which would cover the cost of such a dredge." (R. 212-213)

An analysis of the Indenture (R. 17-73) together with the construction contract (R. 192-206) bears out Johnson's unmistakable reliance upon RFC. The Indenture contains elaborate provisions as to the manner in which all of the loan funds were to be placed in the Construction Fund over which RFC reserved complete control (R. 38, 39, 41). The procedure was for RFC to advance loan monies into the Construction Fund from which it would authorize payment to Johnson upon proper invoices and bills, approved by

Tuolumne, being presented to it for payment. Pursuant to this procedure, RFC caused payments amounting to $510,000 to be made to Johnson up to and including May 28, 1938 (R. 119-120). After this date, RFC refused to authorize any further payments to be made because of a question raised by Tuolumne as to its legal obligation to pay Johnson the balance of over $50,000 claimed to be due for the dredge (R. 214). At this time, there was approximately $55,000 in the Construction Fund. However, some time during the summer of 1938, RFC allowed Tuolumne to withdraw $15,000 from the Construction Fund (R. 215). In 1939, the RFC represented that $40,000 was still in the Fund which would be kept intact (R. 215). Nevertheless, RFC subsequently allowed this money to be withdrawn by Tuolumne prior to the conclusion of the litigation between Johnson and Tuolumne, and without safeguarding Johnson's rights to receive payment of the balance due him from the Fund.

The close working relationship between RFC and Tuolumne is shown by the fact that in the course of the litigation between Johnson and Tuolumne, RFC was at all times fully aware of its progress in all its phases (R. 242). RFC or its counsel had copies of the pleadings and transcripts in the litigation (R. 327, 331) and RFC itself advanced funds for the payment of costs, fees, and other expenses of Tuolumne, in the litigation (R. 236-7, 242).

In addition to the foregoing factors, RFC not only caused the disbursement of the remaining $40,000 in the Construction Fund (R. 412) but it also loaned subsequently an additional $120,000 to Tuolumne which it caused to be satisfied out of Tuolumne's earnings, over which the Indenture gave RFC absolute control. While paying off its subsequent loan from these earnings, RFC made no provision for pay-

ment of Johnson's claims for the balance due upon its construction of the income producing property, viz: the gold dredge (R. 48, 182-183).

From the foregoing, it will be realized that Johnson's claims against RFC are founded upon a broad factual background which began prior to the execution of the 1937 Indenture and continued until as late as the commencement of this suit. The deposition of Walter W. Johnson, consisting of 166 printed pages (R. 281-446), the Agreed Statement of Facts covering only limited facts and basic documents (R. 176-206), Interrogatories addressed by RFC to Johnson (R. 100-113) and Answers thereto (R. 114-24), Requests for Admissions addressed by RFC to Johnson (R. 124-68) and Answers thereto (R. 168-72) and four affidavits filed on behalf of Johnson, to wit, those of Walter W. Johnson, Harley Hise, DeLancy C. Smith, and William F. Kelly (R. 211-242) all demonstrate that there are a multitude of genuine issues as to material facts present in this case which involve the basic liability of RFC and the additional question of whether RFC had waived the Statute of Limitations.

The single issue before this court is whether the summary judgment was improperly granted, inasmuch as there were many genuine issues as to material facts in the cause. It is our conviction that this is a "fact" case and that it involves a great many genuine issues of fact which Johnson was entitled to have heard in a full trial on the merits.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT

I. The District Court made no attempt to determine whether there were genuine issues as to any material facts, and wholly ignored issues which were plainly triable.

II. The Court of Appeals made the same error, and, instead of ascertaining what the issues were, or consider-

ing the conflicting evidence bearing thereon, merely stated that it agreed with the lower court.

III. The net result of the two decisions is that the petitioner has been deprived of his fundamental right to a trial on the merits.

IV. The failure of both courts to give serious or any consideration to the requirements of *Federal Rule 56(c)* amounts to so gross a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision (Sup. Ct. Rule 38, 4, (b)).

ARGUMENT

I. The District Court made no attempt to determine whether there were genuine issues as to any material facts, and wholly ignored issues which were plainly triable.

We earnestly believe that the District Court misconceived the scope of its duties in passing upon the motion for summary judgment. *Rule 56(c)* permits the granting of summary judgment only if it is determined that there is no genuine issue as to any material fact. The inquiry on the motion is to determine whether any such genuine issue exists, not to the weight of evidence bearing upon any such issue.

Sartor v. Arkansas Gas Corp., 321 U.S. 620, 88 L. Ed. 967 (1944);

Whitaker v. Coleman, 115 F. (2d) 305 (CCA 5, 1940);

Doehler Metal Furniture Co. v. U.S., 149 F. (2d) 130 (CCA 2, 1945);

Colby v. Klune, 178 F. (2d) 872 (CCA 2, 1949);

40 California Law Review 204—"Summary Judgment Under Federal Practice" by Judge Yankwich.

We respectfully urge the members of this court to read the District Court's Memorandum Opinion (Tr. 243-274) for the purpose of determining for yourselves that the District Court made no attempt whatever to determine whether there were genuine issues as to any material facts.

Not only is there no reference whatsoever in the lengthy Memorandum Opinion to the correct test for determining whether a summary judgment should be granted, but there is positive indication that the District Court's decision was motivated by two incorrect or improper considerations, viz.:

First, the District Court appeared to base its opinion upon a certain "Agreed Statement of Facts" which the District Court erroneously conceived to be the entire factual basis for decision. Thus paragraph 1 of the Memorandum Opinion refers to the Agreed Statement of Facts and discusses its contents. Paragraph 2 of the Opinion further states, at R. 251:

> "In the Court's view of the issues, and in the light of the Agreed Statement of Facts and the factual recitals contained in the above-mentioned reported decisions, only a brief summary of the present pleadings is here required."

The probability that the District Court was thus acting solely on the basis of the "Agreed Statement of Facts" (in addition to the pleadings and the reported decisions) is further substantiated by the fact that the lengthy Memorandum Opinion makes no reference whatsoever to the interrogatories and answers thereto, the requests for admissions and replies thereto, one deposition, and four affidavits which were before the Court and should have been considered. In short, we assert that the District Court overlooked all this material, which plainly indicated the existence of conflicting evidence, and looked only to the pleadings and the "Agreed

Statement of Facts"—which dealt only with certain limited facts.

Second, the District Court exhibited injudicious irritation and annoyance toward De Lancey Smith, Esq., who was then, but is no longer, the counsel for Johnson, for his failure to render a prompt reply to an inquiry from the District judge after the motion for summary judgment was submitted (R. 267-268). In this connection, the court said:

> "The court deplores the fact that counsel for Johnson has not seen fit to exert himself to supply promptly the requested information. Frankness and punctuality are obligations due the court from its officers." (R. 268)

Such annoyance and irritation found further expression when the District Court intemperately characterized the petitioner's claim as an "appeal for alms" rather than for "justice" (R., 243), and further characterized the claim as "but another instance of grasping at straws in an effort to make Uncle Sam pay for Johnson's own improvidence or misfortune" (R. 273).

We submit that it ill becomes any court to address such intemperate language at a striving litigant, and we submit further that the fault is grossly compounded when in doing so the court wholly fails to give judicial consideration to the issues at hand, and at the same time denies the litigant his fundamental right to a "day in court."

The following resume of the petitioner's principal contentions herein demonstrates clearly the many issues of material facts which existed and which were ignored by the District Court.

1. *Limitations and Laches.* The District Court held that any claims Johnson might have had against RFC for diversion of monies in the Construction Fund must have accrued in 1938 when RFC caused the balance of the Con-

struction Fund to be diverted to other purposes, and held accordingly that the six year statute of limitations on claims against the United States barred Johnson's claims in 1944 (R. 261).

It is clearly established that the statute of limitations may be waived, and that a party (even including a public agency) may be estopped to assert limitations or laches by statements or conduct.

Adams v. California Mutual B. & L. Association, 18 C. (2d), 487 (1941);

Benner v. I. A. C., 26 C. (2d) 346 (1945);

Berkey v. Halm, 101 C.A. (2d) 62 (1950);

Industrial Indemnity Co. v. I. A. C., 115 C.A. (2d) 684;

Bollinger v. National Fire Insurance Co., 25 C. (2d) 399 (1944).

The record before this court contains numerous examples of RFC conduct which, if proved, would constitute a waiver of the statute of limitations and estop RFC from successfully asserting laches. In this regard, Johnson must only demonstrate that a genuine issue of fact exists on the point, and if so, the summary judgment should not stand.

The case of *Begnaud v. White,* 170 F. (2d) 323 (CCA 6-1948) is remarkably similar to the instant case in that a summary judgment had been granted on the ground that there was no genuine issue as to the fact that the action was barred by limitations. Plaintiff and appellant, however, had filed an affidavit in opposition to the motion for summary judgment, claiming that it had refrained from filing suit within the statutory period in reliance on the statements and conduct of the defendant. The Court of Appeals held that this showing created a genuine issue as to a material fact, saying:

> "* * * Whether the jury would accept such testimony at its face value or reject it is not the present question. Taking it at its face value on the motion for summary judgment, it clearly puts in sharp issue the defendant's claim that the bank's liquidators did not rely upon the representations and negotiations of White." (*Begnaud v. White*, 170 F.2d 323, 327)

Just so in the instant case Johnson's showing in opposition to the motion for summary judgment contained abundant evidence in support of the issue that the RFC was estopped to assert the statute of limitations and had waived the same. RFC promised on many occasions to pay Johnson if and as soon as the Tuolumne litigation was finally determined in Johnson's favor (R. 123, 219, 417-419). For example, Mr. Johnson's Answer to Interrogatory No. 64 states in part:

> "* * * among other things stated by Mr. McCartney or his subordinates, it was said that if Johnson Company won the appeal from the State Court decision in Stanislaus County, *RFC would arrange that the balance due Johnson Company under the contract would be paid.*" (Italics ours) (R. 123)

And in his affidavit, Mr. Johnson stated:

> "* * * Upon many occasions between 1944 and 1947, Mr. McCartney, at the office of RFC at Washington, told me that as soon as the Federal court case was finally determined in our favor, if it was, RFC would arrange to pay Johnson Company." (R. 219)

In addition, there is evidence demonstrating a continuing willingness of RFC to negotiate a settlement with Johnson (R. 215, 217, 224, 227-8, 238).

There is not a single indication of any intention on the part of RFC at any time to assert the statute of limitations

or laches as a bar to Johnson's claims. In view of the foregoing it is clear that at the very least, a genuine issue of material fact exists with respect to waiver of limitations and estoppel to assert laches in this case.

2. *First Cause of Counter Claim.* The District Court assumed, without deciding, that Johnson's claim as the beneficiary of a third party contract was valid, but that such claim was barred by limitations. If the question of limitations is put to one side, we believe that the question whether a party is a beneficiary of a third party contract depends largely upon the "intent" of the parties thereto. The question of intent must be determined by analyzing the documents themselves as well as the factual situation surrounding their execution. In cases somewhat similar to ours, a supplier has thus been held to be the beneficiary of such a contract.

Carson Pirie Scott & Co. v. Parrett, 346 Ill. 252, 1748 N.E. 498 (1931);

Woodhead Lumber Co. v. E. G. Niemann Investments, Inc., 99 Cal. App. 456 (1929);

City of Richmond v. Goodloe, 308 Ky. 549, 215 S.W. (2d) 128 (1948);

Niemann v. Nadelman, 136 Misc. 386, 240 N.Y.S. 47 (1930).

See also:

Corbin on Contracts, Vol. 4, Sec. 776.

This "intent" of the parties can only be determined in this case by a careful analysis of the complicated factual background which this record can only suggest. It was therefore clearly error to deny Johnson the chance to present and develop the full factual story of the transaction.

3. *Second Cause of Counter Claim.* It is apparent the District Court rejected Johnson's second cause of counter claim because it misunderstood the basis of Johnson's claim of lien. Johnson does not claim "vendor's lien" nor a common law lien based upon possession. Neither does Johnson ground his claim upon a mechanic's or other statutory lien. Johnson waived all liens. This cause of counter claim, like the balance of Johnson's case, except for the first cause of counter claim, sounds in equity. It is predicated upon equitable rules of estoppel and upon the maxim that he who seeks equity must do equity.

Johnson contends it has a prior lien. That claim rests primarily upon grounds of equitable estoppel. A case in point is:

Wichita Fed. Sav. & L. Ass'n v. Jones, 155 Kan. 821, 130 P.(2d) 556 (1942).

There the money lender with a first mortgage did not make the entire loan, and because of that, some of the suppliers of labor and material were not paid. They filed mechanic's liens. The Court held that, although the mortgage was expressly senior to the mechanic's liens, the mortgagee was estopped to set up that priority. The Court said at 130 P.(2d) 559:

> "We are of opinion the materialmen in seeking information as to the source from which they were to be paid and learning that a mortgage had been made for the purpose of financing construction, had a right to rely thereon, at least to the extent that the amount of the loan would be advanced, whether they received it or not."

Cf. *Knox v. Kaelber,* 140 N. J. Eq. 474, 55 A.(2d) 53 (1947);

Mitchell v. West End Park Co., 171 Ga. 878, 156 S.E. 888 (1931);

Northwestern Mut. Sav. & L. Ass'n v. Kessler, 66 N.D. 737, 268 N.W. 692 (1936);

Title Guar. T. & S. Bank v. Clifton Forge Nat. Bank, 149 Va. 168, 140 S.E. 272 (1927).

Foreclosure of the chattel mortgage by RFC, and sale, cannot affect the rights of the parties. Equity will transfer Johnson's lien to the proceeds of the sale and enforce it against RFC.

Pomeroy Equity Jurisprudence, Vol. VI, Section 1080 (5th ed. 1941).

4. *Third Cause of Counter Claim.* This cause of counter claim is based upon the assertion that RFC was "unjustly enriched" by receiving the earnings of the dredge during its period of operation without assuring that Johnson was fully paid for constructing it. The District Court's error in granting summary judgment on this cause of counter claim is best illustrated by the Court's conclusion (R. 271):

> "Under the pleadings, the stipulation, and the exhibits in this case, Johnson has completely failed to establish 'unjust enrichment' on the plaintiff's part."

Once again the Court weighed the limited facts referred to, and held that Johnson had failed to "establish" unjust enrichment on the part of RFC. Of course, Johnson had no burden of "establishing" any fact at all on summary judgment procedure. It merely had to show that a genuine issue of a material fact existed in the case.

The Court did concede that RFC was enriched (R. 270). It was enriched because it received all the earnings from the operation of the dredge (R. 270). It was further enriched in that it received the dredge as security for its first chattel mortgage while Johnson remained unpaid.

Then, by this suit, RFC sought to enrich itself further by selling at foreclosure a security for which the builder had never been fully paid, and by pocketing the proceeds without using any part of them to pay for that security. Whether or not this enrichment is unjust can only be determined fairly after a full trial on the merits.

The cases hold that where a lender advances money to a property owner for construction of a building, taking a first mortgage for security which is prior to all mechanic's lien claims, then all of the loan fund must be devoted to costs of construction. If any supplier of material or labor is not paid in full, any unexpended portion of the loan fund is impressed with an equitable lien in favor of the unpaid suppliers, who to this extent come ahead of the mortgage.

Smith v. Anglo-Calif. Trust Co. 205 Cal. 496 (1928);

Pacific Ready-Cut Homes Inv. v. Title Ins. & Trust Co. 216 Cal. 447 (1932);

Theatre Realty Co. v. Aronberg-Fried Co., Inc., 85 F. (2d) 383 (8th Cir. 1936);

Wichita Fed. Sav. & L. Ass'n v. Jones, 155 Kan. 821, 130 P(2d) 556 (1942);

Whiting-Mead Co. v. West Coast B & M Co., 66 C.A. (2d) 460 (1944)

Since the entire loan fund was earmarked for construction of the dredge and related acts (R. 37, 38, 119, 200), RFC's diversion of the monies to other purposes was wrongful. This diversion of funds is clearly one basis of RFC's liability. Once the lien attached to the monies in the Construction Fund it is manifest RFC could not escape that lien by transferring the funds to third parties.

National Surety Co. v. County Bd. of Educ., 15 F(2d) 993 (CCA 4, 1926);

Hadley v. Passaic, Nat. B & T Co., 113 NJ Eq. 548, 168 Atl. 38 (1933).

RFC's unjust enrichment is three-fold. *First,* Johnson provided the security for both RFC's first mortgage and its second mortgage while RFC used the funds designated for building the dredge to make later repairs on it, or for some such purpose (R. 413). *Second,* RFC took the earnings, leaving Tuolumne nothing with which to pay Johnson. That was the very essence of injustice. *Finally,* by this suit RFC seeks to foreclose its first mortgage, sell the dredge and take all the proceeds, still without paying for the dredge. Only by a full trial on the merits could all the pertinent facts be brought out. By denying Johnson the right to trial, the District Court and the Court of Appeals have effectively prevented Johnson from developing the myriad facts which cumulatively would have established that RFC was *unjustly* enriched. For that error the judgment should be reversed.

5. *Fourth Cause of Counter Claim.* This cause of counter claim is based upon the proposition that RFC became a constructive trusteee for the benefit of Johnson when it appropriated the proceeds of operating the dredge while Johnson remained unpaid for constructing it. Here again, the trial court misconceived Johnson's cause of counter claim. Johnson does not assert deliberate dishonesty or intentional fraud on the part of RFC. Johnson does, however, assert that when one acquires title to property to which another has a better right, a court of equity will convert him into a constructive trustee.

Crosby v. Clark, 132 Cal. 1, (1901);
Johnson v. Clark, 7 Cal. (2d) 529 (1936).

"A constructive trust is imposed not because of the intention of the parties but because the person holding

the title to the property would profit by a wrong or would be unjustly enriched if he were permitted to keep the property. A constructive trust, unlike an express trust or resulting trust, is remedial in character. (Restatement, Trusts, Vol. 2, p. 1249). *Sampson v. Bruder*, 47 Cal. App. (2d) 431, 435 (1941).

The record in this case, incomplete as it is, shows clearly that RFC as a constructive trustee recognized its obligation to pay Johnson if Johnson won its suit against Tuolumne (R. 215, 216, 217-18, 219). It is quite clear that RFC did not repudiate its obligation to pay Johnson until the litigation with Tuolumne terminated in 1949, and for that reason the statute of limitations did not begin to run in favor of RFC until that time.

Oldland v. Gray, 179 F. (2d) 408 (CA 10, 1950).

6. *Fifth Cause of Counter Claim.* This cause of counter claim is based upon the sales tax which was payable by Johnson on the price of the dredge. The parties had anticipated that such a tax might be assessed so they provided in Article X of the Construction Contract (R. 199-203) that "sales taxes paid thereon, if any, and in accordance with Article XIII," should be a proper charge against the revolving fund which in turn would be replenished from the Construction Fund over which RFC had control. RFC tacitly agreed to pay any sales tax assessed on the price of the dredge as a legitimate charge on the Construction Fund or as a proper charge against the earnings of Tuolumne. Such taxes, if they arose, were a cost item of the dredge and in this respect, the liability of RFC to pay for such taxes has the same basis as the first four causes of counter claim.

RFC's liability depends not merely upon the terms of the 1937 trust indenture and construction contract, but also on

the dealings and negotiations of the parties. We submit that it is clear that there were genuine issues of fact upon which the liability of RFC was predicated and the court should not have summarily denied trial on these issues.

II. The Court of Appeals made the same error, and, instead of ascertaining what the issues were, or considering the conflicting evidence bearing thereon, merely stated that it agreed with the lower court.

Appellant filed a sixty-nine page brief with the Court of Appeals, pointing out the failure of the District Court to determine whether there were genuine issues as to material facts, and pointing out further that there were genuine issues on such matters as the following, viz.: That it was the *intent* of all concerned in the 1936-1937 negotiations that Johnson should be paid in full out of the Construction Fund; that Johnson relied on the Construction Fund as the sole source of payment; that RFC disbursed the Construction Fund in violation of Johnson's rights; that RFC promised and represented that it would pay Johnson; that the reason it gave for not paying promptly was that the litigation between Johnson and Tuolumne had not become final; that RFC requested Johnson not to press its claim against RFC until litigation ended; that as soon as the litigation ended RFC negotiated for a settlement; that Johnson relied on these negotiations as a waiver of and estoppel to assert the statute of limitations; that a relation of trust and confidence existed between Johnson and RFC; that RFC's appropriation of the earnings from the dredge constituted unjust enrichment, under the circumstances; that the time when the statute of limitations began to run was a genuine issue of fact.

The Court of Appeals in its Opinion filed February 10, 1956, does not even allude to these formidable contentions.

Instead, the author of that Opinion dwells upon a number of procedural matters disclosed by the record. The Opinion points out at some length that although a request for 21 admissions was served on appellant by appellee on November 4, 1952, the answers thereto were not filed until December 8, 1953. From this overdue filing the opinion implies that appellant, in effect, admitted each of the matters on which an admission was requested. The true fact is, however, that the late filing is explained by a "Stipulation for Supplementation of Record on Appeal" (R. 279) which expressly provides:

> "It further appearing that the court and counsel for the respective parties treated said answers as if they had been filed." (R. 280)

The Court of Appeals was thus in error in its conclusion that appellant had, in effect, admitted each of the matters on which an admission was requested.

> *Bowers v. E. J. Rose Mfg. Co.*, 149 F.(2d) 612, (CCA 9, 1945)

The only discussion of the main basis for appellant's appeal is contained in a single paragraph in which the Opinion states that:

> "* * * the District Court *impliedly* held that the pleadings, deposition and admissions on file, together with the affidavits, showed * * * that * * * there was no genuine issue as to any material fact * * *", (italics ours)

and that "we agree with that holding" and further states that it would agree with the holding even if the admissions on file did not include the admissions requested by appellee on November 4, 1952.

It will be seen that the court completely failed to review the record in order to determine whether compliance with Rule 56(c) had been observed. The court did not even mention the decision of the Court of Appeals for the Sixth Circuit in *Begnaud v. White*, 170 F.(2d) 323 (1948), where the Court of Appeals found that a genuine issue of fact existed relating to the waiver of the statute of limitations and hence reversed a summary judgment.

It seems anomalous for the Court of Appeals for the Ninth Circuit to require a person appealing to it to prepare a statement of points on which appellant intends to rely, and for such appellant to file a thorough and careful brief supporting those points, when the court avoids discussion of the points in its Opinion. Your petitioner respectfully suggests that an Appellate Court may unwittingly fail to analyze and consider sufficiently the points and authorities in a complicated case where it decides the case without discussing the points raised by counsel, and, as the Court of Appeals did, merely states in general terms that it "agrees with the court below." In this connection, the following language by James A. McLaughlin of the Los Angeles Bar appearing in *9 California State Bar Journal*, at page 246, is in point:

> "Regardless of the superior qualities which a judge may possess, it is almost a mathematical certainty that he would not give the cases in which he wrote no opinion the same careful consideration which he gives to the cases where his opinion will be perpetually subject to the scrutiny of judges, professors, legal writers, and of the legal profession in general."

III. The net result of the two decisions is that the petitioner has been deprived of his fundamental right to a trial on the merits.

IV. The failure of both courts to give serious or any consideration to the requirements of Federal Rule 56(c) amounts to so gross a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision (Sup. Ct. Rule 38, 4, (b)).

CONCLUSION

Petitioner is a small business enterprise which has specialized for some years in the construction of gold dredges. It contracted to build such a dredge for Tuolumne on the faith and credit of the RFC loan. The loan was more than adequate to pay the cost of the dredge. But when the dredge was finished RFC diverted the balance of the loan to purposes not connected with its cost of construction. This was wrongful.

We have shown it is the law that when a lender establishes a loan fund for the purpose of paying a builder, and the builder, who would otherwise have had a lien upon the building, relies instead upon the loan fund for payment, the lender is liable as a matter of law to the builder if he diverts the loan fund to other purposes before the builder is fully paid.

We confidently believe that if a trial on the merits is allowed we shall clearly establish the ultimate liability of RFC for the payment of the balance due.

Johnson was entitled to a trial on the merits. Johnson was entitled to its day in court. It was entitled to put its President, Mr. Walter W. Johnson, on the stand, so that he could personally present his evidence to the court in full and without summary deprivation of the right to a fair hearing. He was entitled to call and examine RFC's repre-

sentatives with whom he negotiated and obtain their admissions as to the negotiations and promises which were made. He has been denied the most fundamental right afforded by our judicial system. We earnestly urge the court to issue its writ of certiorari, and we submit that there is a sufficient showing of genuine issues of material facts in the record to warrant a per curiam reversal of the judgment of the Court of Appeals.

Respectfully submitted,

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Dated: June 15, 1956

(Appendix follows)